> In a case where the act of a creditor does not discharge a surety, but the creditor has nonetheless sacrificed or impaired a security, or by his neglect or default allowed it to be lost or diminished, the surety is entitled in equity to be credited with the deficiency in reduction of his liability.

However, in that case the judgment did go on to state that the surety's entitlement is lost if he bargains away his right to complain.

In *Provincial Bank of Canada* v *Prince Edward Island Lending Authority*,[6] it was held that:

> A creditor owes a duty to the guarantor of a debt to exercise due diligence in preserving and enforcing securities applicable to the debt guaranteed. Consequently, where a creditor, holding a chattel mortgage and a charge under s 88 of the Bank Act, RSC 1970, c B-1, as security for a debt fails to exercise ordinary prudence to realize the securities and permits the debtor's assets to be dissipated, a guarantor of the debt is discharged from his obligation.

In the instant case there certainly was a debenture which was not caused to be crystallized. Whether that amounted to negligence or a breach of implied warranty or duty and whether or not the third defendant had bargained away his rights preserved by ss 92 and 94 and in any event whether as a result there had been an impairment of the security all provide triable issues.

Accordingly the appeal is allowed with costs. The O 14 judgment as against the third defendant is set aside. The third defendant is given unconditional leave to defend.

Order accordingly.

Solicitors: *Shook Lin & Bok*; *Adnan Sundra & Low.*

Reported by *Wong Kim Fatt*

Chua Kim Suan v Ang Mek Chong

HIGH COURT (KOTA BAHRU) – CIVIL SUIT NO 94 OF 1981
KC VOHRAH J
20 OCTOBER 1987

Succession – Distribution of estate – Deceased died intestate – Entitlement to property – Whether lawful son of deceased – Births and Deaths Rules 1958, r 7 – Births and Deaths Registration Act 1957, ss 14, 32(2), 33(1) & (2)(b)

Evidence – Birth certificate – Admissibility of – Births and Deaths Rules 1958, r 7 – Births and Deaths Registration Act 1957, ss 32(2) & 33(2)(b) – Evidence Act 1950, ss 112 & 114(g)

In this case, the plaintiff sought a declaration that X was not the lawful son of the deceased and therefore not entitled to the deceased's estate. The plaintiff also sought an order that the estate be distributed among herself, one other niece and nephew of the deceased, and the defendant. The plaintiff contended that X was the son of Y and Z and not the son of the defendant. The defendant, however, maintained that X was the lawful son of the deceased and herself.

Held, dismissing the plaintiff's claim:

(1) X's certificate of birth, having been issued under s 14 of the Births and Deaths Registration Ordinance 1957 and in the prescribed form, Form A, under s 7 of the Births and Deaths Rules 1958 and it having been purportedly certified by an officer specified under s 32(2) of the 1957 Ordinance, may be received as evidence under s 33(2)(b) of the Births and Deaths Registration Act 1957 (Revised 1983) although the certificate itself will not specifically state that it was certified under s 32(2) of the 1957 Ordinance. The entries in X's certificate of birth constituted strong presumptive evidence that the deceased and the defendant were parents of X and they corroborated the evidence of the defendant that X was the child of the deceased and that she gave birth to him. Indeed, these entries showed that Y and Z were not X's parents.

(2) The failure on the part of the plaintiff to call either Y or Z as witnesses gave rise to the inference under s 114(g) of the Evidence Act 1950 that the evidence, if it had been produced, would have been unfavourable to the plaintiff. In fact, Y and Z, called as witnesses by the defendant, gave evidence unfavourable to the plaintiff in that they said that X was not their child as alleged by the plaintiff.

(3) Having regard to the evidence, the defendant was well within the child-bearing age of a woman when she gave birth to X. Neither could any inference be made that the deceased was impotent or sterile merely because he had no issue earlier on from his two marriages.

(4) Section 112 of the Evidence Act 1950 had no application in the instant case as the issue was not concerned with the legitimacy of X but whether X was the issue of one or another set of lawfully wedded parents.

(5) As the plaintiff's case was based on mere assertions of herself and that of the other witnesses, she had not established her claim.

Legislation referred to
Births and Deaths Registration Act 1957 ss 14, 32(2), 33(1) & (2)(b)
Births and Deaths Rules 1958 r 7
Evidence Act 1950 ss 112 & 114(g)

Wan Mustapha for the plaintiff.
MS Nayagam for the defendant.

Cur Adv Vult

KC Vohrah J: Is Tiu Pang Hua (Pang Hua) the son of Tui Jock Soon (deceased) and Ang Mek Chong, the defendant? The plaintiff says Pang Hua is not. The plaintiff says Pang Hua is instead the grandson of the defendant and the step-grandson of the deceased. The defendant maintains that Pang Hua is the son of the deceased and herself.

The reason for the dispute? Four pieces of land, one of which has a house on it and all these properties, the plaintiff alleges, comprise the estate of the deceased. The plaintiff claims she is a niece of the deceased and that she and one other niece and a nephew of the deceased

together with the defendant are entitled as beneficiaries to the estate. If indeed Pang Hua is the lawful son of the deceased, then of course the plaintiff, the other niece and the nephew of the deceased would not be entitled to the estate of the deceased who obviously died intestate.

The plaintiff seeks a declaration that Pang Hua was not the lawful son of the deceased and that therefore he is not entitled to the deceased's estate and for an order that the estate be distributed among herself, the other niece of the deceased and the defendant.

It is not disputed that the deceased had two wives, the defendant being the second wife, and that the first wife did not bear him any child. It is also not disputed that before her marriage to the deceased the defendant was a widow and she had three children from her previous marriage. Nor is it disputed that Pang Hua was born on 19 May 1968.

The plaintiff's case is based on assertions of herself and four other witnesses that Pang Hua is not the son of the deceased and assertions of herself and one witness that Pang Hua is the son of Owi Thien Tiu (DW3) and Ang Soo Hun (DW4). It was also argued that an inference can be drawn from the evidence that the deceased was impotent and sterile and therefore he could not have fathered Pang Hua. Further, it is argued that the defendant could not have given birth to Pang Hua in 1968 because she was then past child-bearing age. On the other hand the evidence of the defendant was that she gave birth to Pang Hua and that the deceased was the boy's father. The birth certificate in respect of Pang Hua shows particulars that the deceased was the father and the defendant is the mother of Pang Hua. And Owi Thien Tiu (DW3) and Ang Soo Hun (DW4) categorically stated that Pang Hua is not their son.

According to the evidence of the plaintiff, her eldest sister's daughter Ang Soo Hun (DW4) married Owi Thien Tiu (DW3), the son of the defendant. She asserted that Pang Hua was their son and that the deceased adopted this boy as his son because he himself had no lawful issue. In her examination-in-chief she did not give the basis for her assertion that Pang Hua was not the deceased's son save to say that the uncle did not have an issue because 'I know this myself – he was my uncle and I would go to his house'. As regards the other assertion that Pang Hua was the son of DW4 and DW3, she did not give the basis for her view. She, however, called four witnesses to give evidence in support of her assertions.

Three of her witnesses, PW3, PW4 and PW5, were supposed to have known the deceased. They alleged that they were from the same area as the deceased. PW3, Som bte Daly, said that she used to go to the deceased's house for betel nut leaves and tobacco. She said the deceased and the defendant were married for 20 years but did not have any children from the marriage. I cannot see how by the mere fact of her going to the deceased's house for betel nuts and tobacco she therefore knew that the deceased and the defendant had no child from the marriage.

PW2, Mohd Nawi, said the defendant and the deceased were married for 30 years and had no children from that marriage. This witness too gave no basis for this knowledge. PW5, Abdullah bin Mat, said that the deceased was a close friend of his and that he used to go to the deceased's house. He said the deceased married the defendant before the first wife died and that there was no issue from the first and second marriages. He said Owi Thien Tui (DW3) is the father of Pang Hua although the basis for this assertion was not given.

The claim by PW5 that he was a good friend of the deceased and that he used to go to his house may be true but to infer from there that therefore he knew intimately the family life of the deceased including as to whether he had a child or not from his marriage with the defendant is to go too far.

One witness who could have thrown light on the dispute is PW2, Mek Nab, who, it is not disputed, was informally adopted by the deceased and his first wife. She asserted that Pang Hua was not the son of the deceased. It is not disputed that Pang Hua was born on 19 May 1968 as earlier stated. But by that time, Mek Nab had already left the house of the deceased. Although during her examination-in-chief she was not clear about it, under cross-examination she said she thought she was born in 1938. Under cross-examination, she admitted that she had stated earlier in another trial, and she said this was the truth, that when the first wife (of the deceased) died she was 18 years old and that after her death she stayed with the deceased for two years after which she stayed separately because the second wife (the defendant) was not on good terms with her. Going on the basis of what she said that would have meant she had left the deceased's house in 1958, ten years before the birth of Pang Hua. In her evidence, she said she did go back to visit the deceased before her conversion to Islam which according to her was 18 years ago, ie before 1969. On the other hand, her evidence given in the other court (the record of the proceedings in that hearing, P2, was admitted by agreement of both counsel though originally objected to by the plaintiff's counsel) was that after she left the deceased's house two years subsequent to the death of the first wife she did not visit the deceased although he used to come to her house. She said she never went back to the previous house. Although she denied having said these in the previous hearing the record shows that she did say all these and that she gave these answers to questions put by that court. To my mind, she was not a reliable witness.

I am more inclined to think that because her relationship with the defendant had soured after the death of the first wife of the deceased, she left the deceased's house and never went back to the house. If she had stayed away for so long from the house of the deceased, how then could she have known that the defendant did not give birth to Pang Hua or that Pang Hua was not the lawful child of the deceased?

One peculiar aspect of the plaintiff's case is in relation to para 7 of the statement of claim. It states that the plaintiff 'contends that the said minor (Pang Hua) was and is the grandson of the defendant and also the step-grandson of the deceased.' In her evidence the plaintiff asserted that Pang Hua is in fact the son of Owi Thien Tiu and Ang Soo Hun. Thus these two persons should have been important witnesses for the plaintiff. But the plaintiff did not call either of them as witnesses although both were subpoenaed by her. I am entitled to infer under s 114 illustration (g) of the Evidence Act 1950 that the evidence which could have been produced and was not produced would, if it had been produced, have been unfavourable to the plaintiff who withheld it. In fact, the two witnesses since they were not called by the plaintiff were instead called by the defendant and they indeed gave evidence unfavourable to the defendant; they said that Pang Hua was not their child as alleged by the plaintiff. And this brings me to the evidence adduced by the defendant.

The defendant called her son Owi Thien Tiu (DW3) and his wife Ang Soo Hun (DW4) to give evidence. As stated earlier, DW3 and DW4 flatly denied the assertion by the plaintiff that they were the parents of Pang Hua. DW3 stated that Pang Hua was his younger brother, the son of the defendant and the deceased. DW4 said that two or three days after the defendant had given birth to Pang Hua she went to see the defendant during the day time. These two witnesses were not shaken in their evidence.

The defendant herself stated that she gave birth to Pang Hua on 19 May 1968 and that the deceased was the father of Pang Hua. She said that it was the deceased who went to the police station to report the birth of Pang Hua. The certificate of birth which the defendant said was in the custody of Pang Hua was produced by Pang Hua (DW2) himself. There was objection originally to the production of this certificate of birth but such a certificate is admissible under s 33(2) of the Births and Deaths Registration Act 1957 (Revised 1983) (Act 299). Pang Hua's certificate of birth purports to have been issued under s 14 of the Births and Deaths Registration Ordinance 1957 ('the 1957 Ordinance') and r 7 of the Births and Deaths Rules 1958 (the 1958 Rules).

The 1957 Ordinance was revised in 1983. Under the unchanged s 14 of the revised law ('the 1957 Act'), it is provided that at the time of registering the birth of any child, the Registrar shall give to the informant a 'certificate of birth' in the prescribed form and certified as required by s 32(2). As stated earlier, in Pang Hua's certificate of birth it is indicated that the certificate was issued under s 14 and r 7. The certificate having been issued under s 14 of the 1957 Ordinance and in the prescribed form, 'Form A', under r 7 of the 1958 Rules and it having been purportedly certified by an officer who was specified under s 32(2) of the 1957 Ordinance (the section in the 1957 Act remains unchanged), I hold that the certificate may be received as evidence under s 33(2)(b) of the Act although the certificate itself does not specifically state that it is certified under s 32(2) of the 1957 Ordinance.

The certificate of birth of Pang Hua being admissible under s 33(2)(b) of the 1957 Act then it shall, under s 33(1), be received without further or other proof as evidence of such facts and particulars relating to such birth as were at the time of making such entry required by law to be set forth in the certificate. Under r 3 of the 1958 Rules, the information to be given concerning the birth of every child born and the particulars to be entered into the register' concerning such birth are as set out in Form A relating to the register and under r 7 (as previously pointed out) the 'certificate of birth' required to be given under s 14 of the 1957 Ordinance is as set out in Form A relating to the certificate. The particulars in the certificate of birth are particulars which reflect the corresponding particulars contained in the register.

It will be noted that under s 36 of the 1957 Ordinance (and it remains unchanged in the 1957 Act) a penalty was provided, inter alia, for making any false statement for the purpose of registration, for furnishing false information touching on any particulars required by the Act and for making a false entry in a register. To my mind, one can expect that the particulars given to a public officer under the law for the registration of births by an informant, in view of the penalty, would be true. And in addition, the entries in the certificate being a reflection of the entries in the register of birth, there is a presumption of correctness attaching to these entries and it is up to the party disputing the correctness to come up with contrary evidence.

Amongst the entries in the certificate of birth are those relating to the date of birth, sex and place of birth of the child, the name of the child's father, the name of the child's mother and her age. Pang Hua's certificate of birth gives the name of his father as 'Tiu Jock Soon', ie the deceased was his father. The mother's name is given as 'Ang Mok Chang', ie the defendant is his mother. And the age of the defendant then was given as '42 years'. To my mind, these entries constitute strong presumptive evidence that the deceased and the defendant were pa-

rents of Pang Hua and they corroborated the evidence of the defendant that Pang is the child of the deceased and that she gave birth to him. Indeed these entries show that DW3 and DW4 are not Pang Hua's parents. It would certainly need more than mere assertions by the plaintiff and her witnesses to disprove that Pang Hua is not the child of the deceased and the defendant.

Let me now consider the argument that the defendant was past child-bearing age when she purportedly gave birth to Pang Hua. The entry in the defendant's identity card shows she was born in 1916 making her 52 years old in 1968 when she purportedly gave birth to Pang Hua. She, however, said the date shown in the identity card is not correct because 'during those days we did not have birth certificate – we tell orally.' She said she was 45 years old when she gave birth to Pang Hua. The birth certificate of Pang Hua as stated earlier shows the defendant's age as 42 years. I find nothing improbable about wrong dates of birth been given in identity cards of persons born in the earlier decades of this century as a result of a lack of legislation governing registration of births and deaths in these earlier days; in Kelantan, legislation was introduced only in 1930 (see Kelantan Enactment No 6 of 1930, now repealed) for the registration of births and deaths. I find that she was not beyond 45, she was more probably 42 as indicated in the certificate of birth of Pang Hua, in 1968, well within the child-bearing age of a woman.

Defence counsel also argued that the deceased was impotent and sterile. True, the deceased had no child from the first wife. But the first wife could have had child bearing problems. On the other hand, the further argument was that even with the second wife he had no child until the defendant purportedly gave him a child in 1968. According to the evidence of the defendant, she married the deceased 'about two years after the war' and that would have meant that if she gave birth to Pang Hua in 1968 that it was well after 20 years of marriage before the deceased had a child. There, however, could have been a multitude of medical and other reasons in relation to the deceased and the defendant as to why the defendant did not conceive earlier and I am not prepared to make an inference that he was impotent or sterile merely because he had no issue earlier on from his two marriages.

That brings me to the argument, this time, of defence counsel. He says once it is accepted by the court that the defendant gave birth to Pang Hua then the presumption in s 112 of the Evidence Act 1950 should be invoked that since the birth was during the marriage of the deceased and the defendant it is conclusive that the child is the child of the deceased and that the only way of disproving that is to show that the defendant and the deceased had no access to each other. With respect, the argument of counsel is misconceived. The issue is not one of the legitimacy of the child, whether the child was born in or out of wedlock but whether the child was the issue of one set of lawfully wedded parents or another set of lawfully wedded parents and therefore the provisions of s 112 of the Evidence Act are not applicable in this case.

Before I conclude, I would like to comment on the manner in which the defendant reacted to a question whether she knew Mek Nab, PW2. It was obvious she knew Mek Nab but she denied knowing her. At first I thought that because the defendant's eyesight was very poor (this was observable in court), she meant she did not recognize Mek Nab but when she was asked to identity Mek Nab at close quarters she said she had not seen her for a long time and she insisted she did not know 'Mek Nab'. I had a distinct impression of her intense dislike for 'Mek Nab' and that was why she reacted petulantly and denied knowing her. I do not consider this incident as detracting from the probability of her evidence relating to her giving birth to Pang Hua and that the deceased was the father of the boy.

To conclude. The plaintiff's pleads that Pang Hua is not the son of the deceased and that he is the grandson of the defendant and step grandson of the deceased. And all that she did by way of evidence was to produce will-o'-the-wisp allegations. And these in the face of the unshaken evidence of the defendant that she gave birth to Pang Hua, that the deceased was the father of Pang Hua supported by Pang Hua's certificate of birth containing entries to that effect. And these in the face of evidence of the alleged parents of Pang Hua, DW3 and DW4, that they were not Pang Hua's parents. Accordingly, the case of the plaintiff fails and I dismiss the claim with costs.

Claim dismissed.

Solicitors: *Wan Mustapa & Co; Rithaudeen & Aziz.*

Reported by *Teo Keang Sood*

Collings Hui Sdn Bhd v United Estate Projects Bhd & Anor

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO D3-22-331-87
VC GEORGE J
28 JANUARY 1988

Civil Procedure – Ex parte interlocutory injunction – Setting aside of – Whether case so overwhelming that court could dispose of issues and grant injunction summarily – Whether breach of contract – Whether cause of action in tort – Balance of convenience – Loss of reputation – Whether parties can be compensated in damages

The first defendant ('UEP') is the developer of a project known as the Subang Jaya Shopping Centre ('the centre') at Subang